Supreme Court, U.S.
FILED
JUN 5 2002
OFFICE OF THE CLERK

No. 01-1624

In The

Supreme Court of the United States

CITY OF MIDDLETOWN, CITY OF MIDDLETOWN PLANNING BOARD, and JOSEPH DESTEFANO,

Petitioners,

v.

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC., and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review a unanimous holding of the Second Circuit that the recovering alcoholics who would have resided in RECAP's planned halfway houses were disabled under the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act, when New York State regulations specifically limited admission only to individuals who were diagnosed with alcoholism and whose condition remained so severe that they were unable to live independently without relapsing?

2. Should this Court review the Second Circuit's unanimous holding that there is a question of fact for trial as to whether the City of Middletown's proffered reasons for denying RECAP's application for a special use permit to operate halfway houses for the disabled were pretextual, when the record is replete with evidence of discriminatory intent?

3. Should this Court review the Second Circuit's unanimous holding that there is a question of fact for trial as to whether the City of Middletown's decision to revoke a prior commitment to fund another RECAP project was intended as retaliation against RECAP for pursuing, *inter alia*, the claims raised by this lawsuit, when the record contains ample evidence of retaliatory intent, including comments by the City's assistant corporation counsel virtually admitting that the City was retaliating?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Regional Economic Community Action Program, Inc. ("RECAP") hereby states that it has no parent corporation and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The recitation of the opinions below contained in the Petition for a Writ of Certiorari is correct, except that the Second Circuit's final opinion in this case, ___ F.3d ___, 2002 WL 449493, will be published.

STATUTES AND REGULATIONS INVOLVED

In addition to the provisions of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, which are set out in Appendices C, D and E to the Petition for a Writ of Certiorari, the following regulatory provisions are relevant to this matter: N.Y. Comp. Codes R. & Regs. tit. 14, §§ 375.1 and 375.8. The text of these regulations are annexed hereto as Appendices A and B, respectively.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari ("Petition") asks this Court to review a unanimous decision of the Second Circuit which the petitioners did not challenge by petition for rehearing or a petition for rehearing *en banc* before the circuit court. The Second Circuit's decision, annexed to the Petition as Appendix B, held that the recovering alcoholics who would have occupied two halfway houses which the respondent, RECAP, planned to construct in Middletown in 1994, were disabled as a matter of law under the FHA, the ADA and the Rehabilitation Act, because admission would be limited by New York State regulations to persons who were unable to live independently and to care for

themselves without jeopardizing their recovery. The unanimous decision further held that there is ample evidence in the record to warrant a trial on two fact-based questions: (1) whether the City of Middletown's proffered reasons for denying a special use permit to operate the halfway houses were pretextual, and (2) whether the City's subsequent withdrawal of a prior commitment to fund another RECAP project was in retaliation for RECAP's filing of a complaint with HUD challenging the denial of a permit to construct and operate the halfway houses. The Petition fails to identify any "compelling reason" why this Court should review these holdings, which do not conflict with the decision of any other circuit court, decide "an important question of federal law that has not been, but should be, settled by this Court," or determine any question "in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. Rule 10. Accordingly, the Petition should be denied.

A. Background

RECAP, which has been joined in this lawsuit by the United States of America ("government"), is a not-for-profit corporation that operates federal and state-funded programs for persons in need. Its complaint alleges that the City of Middletown, the City's Planning Board (the "Board"), and Mayor Joseph DeStefano ("DeStefano" or "mayor") (collectively, the "City") violated the FHA, the ADA and the Rehabilitation Act by denying RECAP's application for a special use permit to establish two transitional houses for persons recovering from alcoholism and their children (the "halfway houses") in Middletown in 1994. RECAP had planned to create an integrated support community by combining several vitally needed services –

including Head Start and the halfway houses – on two contiguous parcels of land located across the street from RECAP's main offices. RECAP's plans were scuttled when the Planning Board denied RECAP's application for a special use permit to operate the halfway houses, although the Board approved RECAP's other proposed uses.

One of the two parcels that RECAP had agreed to acquire was owned by Richard Rowley (the "Rowley property"), where he had operated a lumber business. Rowley's property measured 2.5 acres and ran alongside the Ontario & Western ("O & W") railroad. RECAP planned to use existing buildings on the Rowley property, as well as to build new space, to accommodate Head Start, day care, and health care offices.

RECAP's plan also called for acquiring a much smaller property located adjacent to Rowley's. This property, owned by Michael Formisano (the "Formisano property"), was only a half-acre, and like Rowley's property it bordered the O & W railroad track. RECAP planned to convert an existing building on the Formisano property into a halfway house for men recovering from alcoholism and to construct a new building (which would encroach slightly onto the Rowley property) to house recovering alcoholic women and their children.

Both properties were zoned for industrial use, with the Formisano property zoned I-1 (light industrial) and the Rowley property zoned I-2 (heavy industrial). All of RECAP's proposed programs were permitted uses in I-1 and I-2 districts but required a special use permit from the Planning Board. RECAP was required to make separate permit applications for each property, and these were

considered by the Planning Board at five hearings between August and December 1994.

After the first two hearings, the Planning Board unanimously approved a special use permit for the Head Start and other programs on the Rowley property. Although the Rowley property was zoned for heavy industrial use, bordered the O & W rail line, and was five times the size of the neighboring Formisano lot, no Planning Board member or other City official gave any indication of seriously considering rejection of RECAP's application in order to preserve the Rowley parcel for industrial development. Nor did anyone suggest rejecting the application because users of the property, such as the Head Start children, would be exposed to nuisance or danger from passing trains on the O & W rail line. Claims about preserving the industrial use and the nuisance of passing trains would later form the purported basis for rejecting the permit for the halfway houses on the tiny Formisano property, but with respect to the Rowley permit, discussion at the hearings focused mostly on such matters as automobile traffic and property taxes.

After the approval of the Rowley permit, the Planning Board went on to consider the Formisano permit during three additional hearings and, after the last hearing in December, denied the permit. The Board's purported grounds were that (1) use as halfway houses might impede industrial development in the area (though it did not say the same about Head Start or the other programs on the Rowley property), and (2) the railroad might be a nuisance to residents of the halfway houses (though this point never even came up during the discussion of whether to issue a permit for Head Start, where the children would be impacted by train traffic at least as much as the recovering

alcoholics.) Denial of the permit destroyed the entire project because RECAP's plans to develop the two properties were intertwined financially.

Over the course of the five Planning Board hearings, numerous City officials, including the mayor (who did not sit on the Planning Board but appointed its members), the assistant corporation counsel, and the Planning Board members themselves, made statements indicating that they opposed the Formisano permit because of the nature of the people who would reside in the halfway houses. This evidence was central to the Second Circuit's fact-based decision that a trial was required on RECAP's and the government's disparate treatment claim. We review some of these discriminatory statements in the following paragraphs.

At the August hearing, Mayor DeStefano gave the first of what would be several protracted statements in opposition to the Formisano permit. Aug. Hrg. Tr. at 163-67.[1] In every speech he made, his point was that the halfway houses should be prohibited, not because of concerns about industrial development or because the railroad would be a nuisance or a danger to the halfway house residents, but because he believed Middletown *already had too many facilities for the disabled and others who require social services.* As the transcripts reveal, he was not very subtle in repeatedly voicing his belief that recovering alcoholics would negatively impact the quality of life of other Middletown residents.

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[1] The hearing transcripts are attached to the Affirmation of Alex Smith dated February 1, 2000, Exhibits H through L.

At the first hearing, DeStefano stated:

> RECAP recently had an approval of the Hasb[rouck] Funeral home for a similar type use. And what I have tried to convey to Recap . . . is that *enough is enough. . . . Middletown is not the hub of human services programs.*
>
> . . . .
>
> *Do it in Goshen. Do it in Warwick. Do it in Montgomery. Find a building there. . . .*

Id. at 164-65 (emphasis added).

At the next hearing in September, the mayor again indicated that Middletown should not be "a Social Service hub." Sept. Hrg. Tr. at 86-88. A RECAP official later reminded the Board that "[p]eople who are alcoholic are protected by the Fair Housing Act" and "[t]o deny them a right to housing is a violation of the law. They have a right to have a home just like anyone else." *Id.* at 158. Undeterred, the mayor remarked: "I strongly don't feel that . . . another alcoholism treatment program is something that would benefit our orderly development in that area," and he continued, "it goes back to the whole concept of how much a community can absorb." *Id.* at 174. Without explanation, the mayor asserted that RECAP's alcoholism facilities would "infringe upon future development in that area," *id.* at 181, and concluded by saying: "I think brighter days are ahead for Middletown, if we can control the different not-for-profit agencies that are coming in . . . and the mission statement is admirable . . . but they should not be doing it solely in the City of Middletown." *Id.* at 181-82.

Other officials speaking at the September hearing echoed the mayor's views. The assistant corporation counsel stated: "The problem is that as the Mayor has identified, there seems to be a tremendous over-concentration of these types of facilities in this City as compared to the surrounding townships . . . that's why we're wrestling with it – *why are they all here?*" *Id.* at 201-02 (emphasis added). He also questioned, without citing any basis, whether "these people would or would not have criminal histories that are coming into this facility," because "there are people out there that are going to be living near this facility [and] are going to want to know these answers." *Id.* at 192.

Board member Dan Miner then stated: "*The question that we're all wrestling with* . . . is if this [alcoholism] is very wide spread in our society . . . *why do we have to have all the treatment facilities right here in Middletown?*. . . . " *Id.* at 205 (emphasis added). Board Chairman Seth Arluck wrapped up the September hearing by saying "obviously this is probably a good project. There's a need for this project. *There's some issues about whether it should be in Middletown, and that's what it boils down to*. . . . " *Id.* at 217 (emphasis added).

At the next hearing in October, City Alderman Dan Long made the first extended comments of any speaker regarding industrial development. According to Long, the Formisano site was "on an active rail line" and the City needed to "develop this corridor to help us go into the year 2000 so we can survive. . . . " Oct. Hrg. Tr. at 33-35. The O & W rail line was rarely used, however, as the City concedes at page 10 of the Petition, and Planning Board members were aware of this fact. *See* Miner Dep. at 33 (Board member Miner testifying that in 1994 "I don't

believe [the rail line] was very active"); McCormick Dep. at 52 (Board member Kenneth McCormick testifying that "they don't use the trains now. Maybe one goes through once a year. . . . [N]ot a real schedule");[2] Grammas Dep. at 40 (Board member Ronald Grammas testifying that the rail line was "[n]ot very [active]" in 1994); *see also* Fusco Aff. dated Jan. 31, 2000 ¶ 3 (Middletown Commissioner of Public Works Alfred Fusco stating that in 1994 "traffic along the line was minimal").[3]

At the October hearing, Mayor DeStefano returned to his point that Middletown already had too many social service programs, saying: "New York State recognizes that a large concentration of similar type facilities can substantially alter a community. . . . I strongly believe that the City of Middletown can make a very strong case that our community has exceeded any reasonable level of services and standards that are provided for the special needs population. . . . " Oct. Hrg. Tr. at 38. The mayor then read a list of several "New York State licensed adult residential care facilities" in Middletown, *id.* at 38-41, and stated:

> I believe the *significant factor* for consideration here is the cumulative impact of the Governmentally, not for profit, and privately owned residential facilities for the disabled, mentally retarded, those who suffer from mental illness, drug and alcohol and substance abuse problems.
>
> . . . I submit to you that *the cumulative impact is negative* from both a tax exempt perspective, in

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[2] While "once a year" is an exaggeration, this comment illustrates Board members' awareness that the rail line was infrequently used.

[3] All cited deposition pages are attached as exhibits to the Declaration of Martin J. Siegel dated March 31, 2000.

> which we are nearly forty-two percent tax exempt in our community, *and quality of life perspective.*

Id. at 41-42 (emphasis added). His reference to "quality of life" was a not very subtle invocation of "NIMBY" (not in my back yard), and is classic evidence of discriminatory intent.

The mayor then shifted to the question of industrial development, contending that "the City from the day of its inception, planned the rail lines for industrial and commercial development." *Id.* at 43-45. Richard Rowley then spoke, pointing out that the Formisano property was far from attractive for industrial use, given its small size. *Id.* at 52-53. The mayor then made yet another protracted statement, stating "the community can't take it all [the county's programs for substance and alcohol abuse]. *And that's the bottom line with the whole thing.*" *Id.* at 79 (emphasis added). "There's a threshold that a community cannot support. Cannot become the social services hub of the County." *Id.* at 82.

At the next hearing in November, Middletown's Director of Community and Economic Development, Neil Novesky, made the discriminatory suggestion that businesses would not wish to locate next to facilities serving recovering alcoholics: "We've had a lot of interest [by potential buyers of Rowley's property], *but if the building is occupied by a certain type of social service or support service program, perhaps occupying the building next door will be deterred.*" Nov. Hrg. Tr. at 82-83 (emphasis added).

There was also discussion at the November hearing regarding train traffic as a potential nuisance. Chairman Arluck speculated that trains would idle continuously near

the Formisano property at night and "create quite a nuisance," *id.* at 69-70, 74, but he also conceded that "[a] diesel may never sit there and idle all night. . . . I'm just saying that's a possibility." *Id.* at 99-100. As stated above, Board members knew that the rail line was rarely used, and no City official was then – or is now – aware of complaints by any Middletown resident about adverse effects from train traffic, such as excess noise or fumes. *See* Miner Dep. at 183-84; Moson dep. at 73; Fusco dep. at 129. There was also no evidence whatsoever that trains would actually idle next to the little Formisano property rather than in train yards located miles away, or that they would idle only at night when Head Start and the other programs on the Rowley property were closed, but not during the day when they were open, thus making it applicable to the halfway houses but not to the Head Start program. Furthermore, the Board ignored the fact that buffers can always be erected between buildings and railroad tracks to reduce or eliminate any nuisance, and they further ignored RECAP's reminder at the November hearing that there were already numerous residences adjacent to the train track. *See* Nov. Hrg. Tr. at 93.[4] This fact is also made obvious by a detailed map of the entire area which plaintiffs submitted in opposition to the summary judgment motion. *See* Siegel Decl. dated Mar. 31, 2000 Ex. 1.

At the final hearing on December 1, 1994, Chairman Arluck summarized the reasons why Board members could vote for or against the Formisano application. Dec. Hrg.

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[4] While the halfway houses would have been somewhat closer to the tracks than the Head Start building, the difference was not great, and RECAP's plans (of which the Planning Board was aware) called for a children's play area closer to the tracks.

Tr. at 44-46. Among the reasons to vote in favor was that the Formisano property was "unlikely to be purchased in the near term for an industrial or commercial use." *Id.* at 45. Turning to "reasons to deny this application," Arluck stated:

> *Another reason that was brought up . . . by the Mayor and Council Members that there's an over-concentration of residential and social service facilities in the City*, which tends to put a demand on City services, while at the same time eroding the tax base.

Id. at 46 (emphasis added). Arluck then recommended denial "because it is in an industrial zone, and I am concerned about . . . other industrial users in this area. I'm concerned about train traffic next to a residential facility." *Id.* at 51.

Board member Thomas Swierski then explained why he would vote to deny RECAP's application and concluded:

> I believe that the City . . . has extended itself and embraced significant other services that have come our way, and I have to say that for us to be the magnet for the area is not necessarily for the best industrial development of this or any other project.
>
> So I would say, Mr. Chairman, that I feel that the proper industrial development of this is more important in my vote, and I will vote no for this project.

Id. at 54.

No other Board member gave a statement at the hearing explaining his vote, except for Ronald Grammas, who voted in favor of the application. *Id.* at 55-56. Board

member Miner made no remarks at the hearing to explain his vote but he later acknowledged in his deposition that he was "concern[ed]" during the hearings that Middletown was being overwhelmed by social service facilities. Miner Dep. at 69-72, 142, 239.

When the Board finally voted at the December hearing, the Formisano application was denied 4-2, with Board members Arluck, Swierski, Miner, and Moson voting against and Grammas and McCormick voting in favor. Dec. Hrg. Tr. at 57-58. Significantly, although Arluck had listed the alleged "over-concentration" issue as one of the reasons to vote against the application – and Swierski had explicitly mentioned this reason in his remarks prior to voting – the reason is *absent* from the final written resolution denying the application, which was drafted after the December hearing by the corporation counsel's office. *See* Siegel Decl. dated Mar. 31, 2000 Ex. 23.

The Formisano lot remained abandoned until 1996, when the property was rented to a restaurant supply company. The Rowley property was eventually occupied by two small businesses, Keck Industries (a furniture manufacturer and finisher) and Best Mexican Foods. The City calls these businesses "heavy commercial/light industrial," Petition at 11 n.7, but this description is clearly inaccurate.[5]

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[5] The City, attempting to persuade this Court that there was a legitimate debate going on between the mayor and RECAP about the need for the halfway houses, claims that RECAP conceded that there may not have been a need. *See* Petition at 23. There are no citations to the record for this, and it is not true.

B. The City's Retaliation Against RECAP

In the early 1990's, RECAP acquired a building at 208 North Street in Middletown, where it planned to create a facility for homeless and potentially homeless individuals, some of whom were suffering from disabilities. On June 23, 1993, Neil Novesky advised RECAP by letter that "[t]he City of Middletown Office of Community and Economic Development is pleased to provide this *commitment* of $53,139 for the purchase of furnishings for the project to be located at 208 North Street." Figueroa Aff. dated Mar. 28, 2000 Ex. 1 (emphasis added).

On December 1, 1994, the Planning Board denied the Formisano permit, and four days later, RECAP's attorneys wrote DeStefano that the permit denial violated the FHA and the ADA and that legal action would result unless the permit denial was rescinded. *Id.* Ex. 2. Meanwhile, construction on the 208 North Street project was completed and on December 8, 1994, RECAP's Antonio Figueroa requested release of the $53,139 in promised funds. *Id.* Ex. 3. But the funds were never released.

In January 1995, RECAP filed a HUD complaint under the FHA, ADA and Rehabilitation Act regarding the Formisano permit denial. Soon after, a RECAP affiliate called PACER won a lawsuit reversing the Middletown Planning Board's denial of a special use permit for yet another facility, a boardinghouse serving low-income, homeless individuals, some of whom were disabled.[6]

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[6] This result was affirmed on appeal. *See PACER INC. v. Planning Bd. of Middletown*, 635 N.Y.S.2d 704 (App. Div. 3d Dep't 1995).

After Figueroa's December 8, 1994 request for the release of the promised funds for 208 North Street, the assistant corporation counsel informed Figueroa that the funds would no longer be available as a grant, but instead as a "loan" subject to conditions set by the City. *Id.* ¶ 14. Then, on December 20, 1994, during a critical phone call, the assistant corporation counsel identified a number of problems that DeStefano apparently had regarding security for the loan (which had originally been committed as a grant), whereupon Figueroa asked why the mayor continued to present obstacles to the 208 North Street project. Counsel responded that "*if RECAP had not pursued legal action against the Mayor, he would be much more cooperative*" and that RECAP has to learn "*not to bite the hand that feeds it.*" *Id.* ¶ 15 (emphasis added). Figueroa memorialized this telephone conversation in a letter the following day. *Id.* Ex. 5.

In April 1995, Figueroa received a letter from DeStefano raising new concerns about 208 North Street, which Figueroa answered fully by letter. *Id.* Exs. 7, 8. RECAP received no response from the mayor until early 1996, while RECAP and the City were still litigating before HUD about the Formisano permit. At that time, DeStefano told a RECAP official that the City had totally withdrawn its funding commitment for 208 North Street.

C. Procedural History

RECAP filed this action in the Southern District of New York on November 26, 1997 against the City, the Planning Board, and the mayor alleging claims for disparate treatment, failure to make a reasonable accommodation, disparate impact, and retaliation under the FHA,

ADA and Rehabilitation Act. On June 17, 1998, the United States filed a complaint in intervention.[7]

The defendants moved for summary judgment, arguing *inter alia* that the prospective residents of the halfway houses were not disabled under the statutes and that there was insufficient evidence to support plaintiffs' claims. The district court issued an unpublished Memorandum and Order on September 25, 2000 granting defendants' motion in its entirety. *See* Petition App. A. The district court assumed the prospective residents were disabled and that plaintiffs had established a *prima facie* case under the FHA and ADA, but dismissed each of plaintiffs' claims on the ground that defendants' bases for denying the Formisano permit were legitimate as a matter of law and that there was no evidence of pretext.

RECAP and the government appealed,[8] and the Second Circuit issued a unanimous opinion on February 5, 2002 (as corrected on February 19, 2002) vacating the district court's decision in part. *See* Petition App. B. The circuit held as a matter of law that the individuals who would have resided in the halfway houses were disabled under the federal statutes because state regulations limited halfway house admission only to individuals who were unable to live independently and care for themselves without suffering a relapse, which by definition satisfies the "disability" standard under the relevant federal statutes and regulations. The circuit further held that

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[7] The government raised the same claims as RECAP, except it did not allege retaliation or any claims against the mayor individually.

[8] RECAP did not appeal the dismissal of the individual claims against the mayor.

there was ample evidence for a reasonable jury to find that the defendants' proffered reasons for denying the Formisano permit were pretextual. The circuit also held that a reasonable jury could find that the City reneged on its funding commitment for 208 North Street in retaliation for RECAP's December 5, 1994 letter and subsequent HUD complaint regarding the permit denial. The circuit affirmed the district court's dismissal of the reasonable accommodation and disparate impact claims.

REASONS FOR DENYING THE WRIT

POINT I

THE SECOND CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN HOLDING AS A MATTER OF LAW THAT THE PROSPECTIVE RESIDENTS OF RECAP'S PROPOSED HALFWAY HOUSES WERE DISABLED

The Petition asks this Court to review the Second Circuit's holding that the individuals who would have resided in the halfway houses on the Formisano property were disabled under the FHA, the ADA and the Rehabilitation Act. The circuit based its holding on New York State regulations which prescribe the type of individuals who may reside in halfway houses. *See* Petition App. B at 32a-36a. Under those regulations, which are attached hereto as Appendices A and B, RECAP could only have admitted individuals who were (1) diagnosed with alcoholism (an undisputed "impairment" under the federal statutes) and (2) whose conditions *remained so severe as to preclude them from living independently without relapsing*. As the Second Circuit recognized, "[b]ecause the inability to live independently without suffering a relapse – a baseline

prerequisite for admittance to the RECAP facility – limits the major life activity of 'caring for one's self,' an activity that is 'necessarily [an] important part[ ] of most people's lives,' the residents of the proposed halfway houses would have met . . . the statutory definition of a disability." *See* Petition App. B at 35a (quoting *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 693 (2002)). In making this determination, the circuit precisely applied this Court's decisions construing the definition of disability, and thus there is no need for this Court to grant review.

A. The New York State Regulations

State regulations existing in 1994 and today set strict standards for the operation of "community residences for alcoholism," which are "facilities for persons who are unable to maintain abstinence and continued recovery in an available independent living situation at a particular time." N.Y. Comp. Codes R. & Regs. tit. 14, § 375.1(a). One type of community residence is a "halfway house." *Id.* § 375.1(c). The regulations governing halfway houses provide:

> (c) A person shall be admitted to a halfway house only if he or she:
>
> (1) *has been diagnosed as suffering from alcohol dependence*;
>
> (2) is abstinent from alcohol and mood-altering drugs, except drugs prescribed by a physician familiar with the person's treatment for alcoholism or the treatment of a coexisting physical or mental illness or mental disability;

(3) is not so mentally ill or developmentally disabled that he or she is incapable of participating in the program of the facility;

(4) has completed a course of alcoholism treatment or rehabilitation in an inpatient or outpatient setting; or is involved in an intensive course of alcoholism rehabilitation in an outpatient setting;

(5) *is determined to be unable to abstain without continued care in a structured supportive setting*; and

(6) is in need of alcoholism services on an outpatient basis in addition to the supportive counseling available in the halfway house as determined by the referring alcoholism program and such services are arranged unless they are unavailable.

N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8(c) (emphasis added).

B. The Prospective Halfway House Residents Were Disabled as a Matter of Law

The FHA, the ADA, and the Rehabilitation Act each defines disability[9] as: (1) a physical or mental impairment which substantially limits one or more of a person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment. *See* 42 U.S.C. § 3602(h); 42 U.S.C. § 12102(2); 29 U.S.C. § 705(20)(B). An individual is considered disabled pursuant

[9] For convenience, we employ the term "disabled" or "disability" as a synonym for the term "handicap" used in the FHA.

to the first definition if he or she: (1) suffers from a physical or mental impairment; (2) the impairment affects a major life activity; and (3) the effect is substantial. *See Bragdon v. Abbott*, 524 U.S. 624, 631, 118 S. Ct. 2196, 2202 (1998).

The City does not contest the Second Circuit's determination that RECAP's prospective residents suffered from a physical or mental "impairment." *See* Petition App. B at 33a. Nor could it, because the state regulations require that a halfway house resident be "diagnosed as suffering from alcohol dependence," N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8(c)(1), a condition that is explicitly identified as an "impairment" by federal regulation. *See* 24 C.F.R. § 100.201; 28 C.F.R. § 41.31(b)(1).

The Second Circuit further held that, by virtue of the regulatory criteria allowing admission only if the applicant cannot live independently, the prospective residents' addiction to alcohol would affect the "major life activity" of living independently and caring for one's self. *See* Petition App. B at 34a-35a. There can be no dispute that the ability to live independently and care for one's self is a major life activity; indeed, the express purpose of the Rehabilitation Act and the ADA is to guarantee the rights of people with disabilities to "live independently." 29 U.S.C. § 701(a)(3)(A); *see also* 29 U.S.C. § 701(b)(2); 42 U.S.C. § 12101(a)(8). Keeping with the central purpose of these statutes, federal regulations define "major life activities" to include "functions such as caring for one's self." *See* 24 C.F.R. § 100.201 (FHA); 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii) (Rehabilitation Act); *see also Bragdon*, 524 U.S. at 638-39, 118 S. Ct. at 2205 (discussing these regulations with approval). In its recent *Williams* decision, this Court recognized the same concept in stating that major

life activities are those which are "of central importance to daily life." 122 S. Ct. at 691. As the circuit recognized, this "encompasses normal activities of daily living; including feeding oneself, driving, grooming and cleaning home." *See* Petition App. B at 34a.

The residents of RECAP's halfway houses would have needed assistance in the most basic aspects of daily living, including "managing bills, . . . dealing with landlords, buying groceries, preparing food, [and] keeping the place clean." Quinlan dep. at 77. In *Williams*, this Court made clear that "household chores . . . are among the types of manual tasks of central importance to people's daily lives," 122 S. Ct. at 693, and the circuit, applying that concept, therefore correctly found that RECAP's prospective residents, who would be unable to perform such chores, were disabled.

Moreover, in order to be admitted to the halfway houses, an applicant would have to be so impaired by alcoholism as to be unable to maintain a job without the supportive environment of the halfway house. When treatment for a disability precludes or interferes with working, the major life activity of employment is substantially limited. *See Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2d Cir. 1992). The City confuses the issue by arguing that at some point the residents would have been able to work, but that was only if they continued living in the halfway houses, receiving counseling and other support services, or were no longer in need of a supportive environment, at which point they would be discharged. Moreover, while they were residents, they would receive outpatient services, as required by N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8(c)(6), which could total "as much as six hours a day," while counseling would have exhausted

an additional one to one and one-half hours. Hawkins dep. at 51. Consequently, RECAP's clients would have been unable to have meaningful employment when they first entered the facilities, and while they remained as residents, they would have been limited in what work they could perform. Hawkins dep. at 52-54.

These limitations were also substantial, as the circuit found, because the residents "are unable to abstain from alcohol abuse without continued care; absent assistance, they cannot adequately care for themselves." *See* Petition App. B at 35a-36a. These are the definitions for admissibility under the state regulations, and they mean that no one can be admitted unless they are substantially limited in their ability to live independently and care for themselves without assistance. *See* N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8(c)(5).[10]

The City would have this Court rule that while living at the halfway houses, a recovering alcoholic was somehow cured, as one who has myopia is cured by using corrective lenses. But, as this Court recognized in *Sutton v. United Air Lines, Inc.*:

> The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability . . . if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on

[10] The halfway house residents would have been so impaired by their drinking that they required a thirty-day hospitalization before coming to the halfway houses. *See* DePrado dep. at 10.

> their ability to walk or run. . . . The use or non-use of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.

527 U.S. 471, 488, 119 S. Ct. 2139, 2149 (1999) (emphasis in original). The recovering alcoholics who would have resided at the halfway houses would have received treatment – like the wheelchair described in *Sutton* – which would have improved their condition relative to alcoholics who were still drinking. Nonetheless, even with that treatment, RECAP's clients would have been unable to live independently, care for themselves, or engage in normal jobs. As such, they would have been disabled under the applicable statutes while living at the halfway houses, even after beginning the process of recovery. In short, even if RECAP's clients eventually would have learned to handle basic life skills and hold down some limited employment while residing in the halfway houses, they would have been unable to do so *on their own* without a structured supportive environment. That inability constitutes a "disability."

The City also argues that the state regulations permit discharge between three and nine months after admission and that this is too short to qualify as having a substantial effect on a major life activity. The circuit, and RECAP, disagree. The regulations also make it clear that "no resident shall be discharged if he or she continues to need the services of the residence. . . . " N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8(e). There is no defined time limit on a person's stay in a halfway house; they stay until they have attained the ability to live independently. *See id.*

§ 375.1(g). Given these standards, the Second Circuit correctly held that the residents' impairments would be "long-term." *See* Petition App. B at 36a.

The City further asserts that the Second Circuit failed to make an "individualized assessment" of the effect of alcoholism on each RECAP client. *See* Petition at 9. But such an individualized assessment is not needed in this case because, *by operation of the state regulations*, no individual would have been eligible to live in the proposed halfway houses unless he or she was both an alcoholic and unable to live independently while simultaneously abstaining from alcohol. Alcoholism may not be a *per se* disability, as the City argues, *see* Petition at 9-10, and certain alcoholics who are further along in the process of recovery may not be substantially limited in performing a major life activity. But RECAP could not have admitted such people to its halfway houses. As the Second Circuit recognized, "the existence of statutorily defined levels of impairment obviates the concern expressed in *Williams* about varying intensities of symptoms." Petition App. B. at 35a n.3.

The City's final point that a wealthy recovering alcoholic might obtain services outside a halfway house is irrelevant. That person is just as disabled as a poor person if he cannot live independently; where he goes for help has nothing to do with the question of who is disabled under federal law.

In sum, the Second Circuit's decision is a simple and straightforward application of this Court's decision in *Williams,* and review by this Court is not warranted.[11]

POINT II

THIS COURT SHOULD NOT REVIEW THE SECOND CIRCUIT'S HOLDING THAT THERE IS A QUESTION OF FACT FOR TRIAL REGARDING PRETEXT

The City also asks this Court to review the Second Circuit's holding that there is a question of fact as to whether the City's proffered justifications for denying the Formisano permit were pretextual. As the Rules of this Court provide, certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The errors alleged fall only within these categories. It is quite clear, moreover, that the Second Circuit did not err because the record is replete with evidence of discriminatory intent.

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[11] The Petition makes little effort to challenge the Second Circuit's holding that the prospective residents of the halfway houses also meet the statutes' second definition of disability: having a record of an impairment that substantially limits a major life activity. *See* Petition App. B at 36a. "The intent of this [second definition of disability] is to ensure that people are not discriminated against because of a history of disability." 29 C.F.R. Pt. 1630 App., § 1630.2(k). The prospective residents of RECAP's halfway houses would have been so severely impaired that they required a thirty-day hospitalization to treat their alcoholism before arriving at the halfway houses. There is no question that these people would have had a "record" of having an impairment that substantially limited numerous major life activities.

The Second Circuit relied, *inter alia*, on the various discriminatory statements quoted in the Background section of this brief, "from which a reasonable juror could infer that [the Board] denied RECAP's permit application because of the identity of its clients." Petition App. B at 39a. The comment by Neil Novesky, the City's head of development, that "if the building is occupied by a certain type of social service or support service program, perhaps occupying the building next door will be deterred," *see supra* p. 9, is a classic "NIMBY" discriminatory remark, and is sufficient by itself to create a jury question.

Equally significant evidence lay in the Board's differential treatment of the Rowley and Formisano permit applications. The circuit stated:

> The applications for both properties were made at the same time, by the same entity, for adjoining properties; the principal difference between them seems to be the people whom the projects sought to serve: The Rowley property would serve children, and the Formisano property would serve recovering alcoholics. The plaintiffs argue persuasively that if industrial growth and development were the Planning Board's true concerns, then the Board would have also raised the issue in connection with the Rowley property. . . .
>
> . . . .
>
> The plaintiffs also introduced evidence that calls into question the defendants' second proffered reason for denying RECAP a special-use permit: to protect the halfway house residents from the nuisance effect of the railroad. The evidence indicates that at the time of the Planning Board's decision, trains rarely traveled on the O & W line; when they did, it was at very low

> speeds. A reasonable juror might wonder why the Planning Board worried more about the impact of the railroad on recovering alcoholics than on the children whom it knew would be receiving education, medical attention, and other social services at the adjoining Rowley property. More generally, a juror could infer that if the industrial development and railroad-nuisance concerns led the Planning Board to deny RECAP the special-use permit for the Formisano property, then these same concerns would have led the Planning Board to deny it a special-use permit for the Rowley property. These inferences could establish that the Planning Board's disparate treatment of these two properties demonstrates intentional discrimination against recovering alcoholics and that its stated concerns about the Formisano property were pretextual.

Petition App. B at 41a-43a.

The circuit also noted "additional evidence of pretext" in the form of deposition testimony from one Planning Board member that "the concern that Middletown had a high number of treatment facilities in general was certainly brought home to me" and testimony from another that he was not concerned with industrial or commercial development when it came to the Rowley property. *See* Petition App. B at 43a. The circuit also mentioned that a map of the relevant area showed that it "was not largely industrial," which "may cast doubt in jurors' minds upon defendants' assertion that they sought to 'preserve' it as an industrial area."[12] *Id.* There was still other evidence to

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[12] The City chides the circuit for calling the neighborhood "not largely industrial"; according to the City, the two properties "*are*

(Continued on following page)

which the circuit did not refer, such as Middletown's 1995 "Master Plan," a contemporaneous City-created document that identified large areas on the northern and southern ends of the town as potential locations for industrial development. *See* Siegel Decl. Dated Mar. 31, 2000 Ex. 14. Neither area included the Rowley and Formisano lots. The Master Plan refutes the City's contention at page 11 of the Petition that there was a severe shortage of industrially-developable land; it also discloses where the City really believed industrial development was supposed to occur.

The City expends much effort in its Petition attempting to draw inferences in its favor from the evidence, *see* pages 22-27 – which of course is impermissible at summary judgment – and even makes the startling claim that "it is clear from the record that all of [the Board members'] votes were based on sound planning concerns." Petition at 23. But there is no doubt that the Second Circuit correctly held that there is a question of fact for trial regarding pretext.

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practically ringed by commercial uses." See Petition at 14 n.13 (emphasis in original). But the maps in the record show many residences in the area, and only one industrial use. *See* Siegel Decl. dated Mar. 31, 2000 Ex. 1; Joint Aff. of Fusco, Duncanson and Bruni dated Jan. 31, 2000 Ex. O. On a motion for summary judgment, the City is not entitled to draw inferences that favor its position.

POINT III

THIS COURT SHOULD NOT REVIEW THE SECOND CIRCUIT'S HOLDING THAT THERE IS A QUESTION OF FACT FOR TRIAL REGARDING RECAP'S RETALIATION CLAIM

The City asks this Court to review another fact-based question: whether there is sufficient evidence for a jury to find that the withdrawal of the City's funding commitment for 208 North Street was in retaliation for (1) RECAP's threatening to sue over the denial of the Formisano permit, as expressed in its attorneys' letter dated December 5, 1994, and (2) RECAP's filing of a complaint about that issue with HUD in January 1995. Both actions were protected activity, as the circuit found, because they were actions taken to protest statutorily prohibited discrimination. *See* Petition App. B at 47a.

The City would have this Court overrule the circuit's finding that there are material facts in dispute on this issue. For example, the City contends that RECAP wanted to use a banned contractor in violation of state regulations, which RECAP denies, while RECAP points to a statement by the City's assistant corporation counsel to Antonio Figueroa of RECAP, memorialized by Figueroa in a letter, that "if RECAP had not pursued legal action against the Mayor, he would be much more cooperative" and RECAP has to learn "not to bite the hand that feeds it".[13] Summary

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[13] The City tries to mitigate the obvious retaliatory import of its own lawyer's statement by arguing that he spoke before the HUD complaint was filed. But that leaves the December 5 letter threatening a suit, which came just before he spoke. To overcome the letter, the City argues that it was not authorized by RECAP's board. This frivolous point was not deemed worthy enough to require comment by the circuit,

(Continued on following page)

judgment could not be granted in the face of such conflicting evidence, and the issue most certainly is not worthy of this Court's review.

CONCLUSION

For the reasons set forth above, the writ should not be granted.

Dated: June 5, 2002

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no doubt because the letter made clear that there was a possibility of litigation, which happened just a few weeks later.

APPENDIX A

N.Y. Comp. Codes R & Regs. Tit 14, § 375.1

Section 375.1 Background and intent.

(a) Community residences for alcoholism are facilities for persons who are unable to maintain abstinence and continued recovery in an available independent living situation at a particular time. Community residences are specifically designed and operated to assist persons suffering from alcoholism to develop or maintain recovery in a semi-independent situation through the provision of a structured alcohol-free setting, encouragement of peer group support and training and assistance in the skills of community living.

(b) A community residence must exist in a system of services for its clientele. It cannot be an independently functioning facility without cooperative relationships to other service providers. This is particularly true of relationships with inpatient rehabilitation programs and outpatient clinics since these programs will be expected to provide effective intensive treatment and rehabilitative services which will allow community residences to carry out their assigned mission in the system of services. If inpatient rehabilitation and outpatient programs are not available, accessible, effective and well coordinated with community residences, community residences will be unable to function effectively as prescribed by this Part. This will be particularly problematic in relation to the most underserved groups such as women, the elderly and youth.

(c) Three types of community residences are defined: halfway houses, recovery homes, and supportive living facilities. In addition, longer-term residential chemical dependency programs for youth constitute community

residences. There are many other residential settings other than independent living which may be of assistance to alcoholic persons. However, such settings are not community residences unless they conform to the requirements established by this Part.

(d) All alcoholism community residences, regardless of type, have a number of common characteristics, including but not limited to the following:

(1) a structured alcohol-free environment supportive of continued recovery;

(2) significant cooperation with other agencies in the service delivery system to ensure coordinated, continuous and effective services toward the highest level of recovery and independent living of residents;

(3) a homelike environment providing maximum support for recovery and maximum opportunity to learn and practice the skills necessary for continued abstinence in independent living; and

(4) responsible staff to support and assist the resident as needed in his or her recovery.

(e) A supportive living facility defined in this Part is a unique living situation in which residents live together in small groups, not exceeding 14, for mutually beneficial support but without required onsite staff. Staff and supervision for a number of these small groups is provided from a central location. This arrangement is designed to serve persons who are unlikely to maintain abstinence in independent living but who are able to maintain recovery with peer-group support and minimal staff services.

(f) As a facility which can only exist in a system of services each community residence has an obligation to work cooperatively with inpatient programs, other community residences, nonresidential alcoholism service providers, mental health service providers, social service providers, including especially providers of child care services, vocational rehabilitation agencies, educational institutions and local coordinating and planning groups to ensure that services are available to meet the needs of persons suffering from alcoholism in a continuous, timely and coordinated manner.

(g) While community residences may provide residence for varying time periods, in all cases the length of stay extends only until a resident has attained the skills and ability necessary to maintain abstinence and continue recovery in an available less structured facility or in suitable independent living.

APPENDIX B

N.Y. Comp. Codes R. & Regs. tit. 14, § 375.8

Section 375.8 Program – additional requirements applicable to halfway houses.

(a) Each halfway house shall have agreements with one or more alcoholism outpatient programs to ensure the availability of needed outpatient services to all residents and to establish the conditions and procedures for cooperative and continuous care and treatment in both the outpatient program and the halfway house.

(b) Staff of the halfway house shall provide at least the following services for residents in addition to those required of all community residences:

(1) a structured program of continued services toward recovery from alcoholism;

(2) a constant focus on the development and improvement of the skills necessary to recovery; and

(3) supportive counseling services to ensure that needed services are obtained from community agencies and to ensure continued progress in recovery.

(c) A person shall be admitted to a halfway house only if he or she:

(1) has been diagnosed as suffering from alcohol dependence;

(2) is abstinent from alcohol and mood-altering drugs, except drugs prescribed by a physician familiar with the person's treatment for alcoholism or the treatment of a coexisting physical or mental illness or mental disability;

(3) is not so mentally ill or developmentally disabled that he or she is incapable of participating in the program of the facility;

(4) has completed a course of alcoholism treatment or rehabilitation in an inpatient or outpatient setting; or is involved in an intensive course of alcoholism rehabilitation in an outpatient setting;

(5) is determined to be unable to abstain without continued care in a structured supportive setting; and

(6) is in need of alcoholism services on an outpatient basis in addition to the supportive counseling available in the halfway house as determined by the referring alcoholism program and such services are arranged unless they are unavailable.

(d) Residents shall also receive alcoholism services and services from educational, vocational, social or mental health service providers in the community as needed. Any such services shall be reflected in the resident's individual recovery plan. Residents who are able shall be encouraged to work in the community in paid or volunteer positions as appropriate.

(e) Each halfway house shall be planned and programmed to allow discharge of each resident between three and nine months after admission. However, no resident shall be discharged if he or she continues to need the services of the residence, except as provided in section 375.7(g)(2) of this Part.

(f) Each resident of a halfway house shall have an individual recovery plan prepared by staff in cooperation with the resident and, when applicable, staff of any outpatient programs serving the resident.

(1) The plan shall be prepared within 14 days of admission.

(2) The plan shall specify goals to be attained while the resident is in the residence, and the services and activities of staff and the resident to enable attainment of goals.

(3) The plan shall be reviewed by residence staff and, when applicable, outpatient program staff, and the resident, at least monthly and revised as indicated.

(g) Each halfway house shall implement a process of utilization review, which shall include at least a monthly review of each resident who remains in the residence longer than six months, or the facility's planned length of stay if less than six months. Such review shall be conducted by the residence manager, the residence manager's supervisor, if one, and staff of other agencies providing alcoholism services to the resident. The purpose of such review shall be the determination of the necessity of continued residence by the resident and, if continued stay is necessary, the services and circumstances necessary to allow the resident to be discharged. Services identified shall be incorporated into the resident's individual recovery plan as a discharge plan to be implemented, to the extent possible, by residence staff and staff of the resident's outpatient program, if any.

(h) Each halfway house shall have at least four full-time equivalent staff, except that, if there is more than one staff member residing in the facility, the minimum shall be three. In a halfway house of more than 16 beds, there shall be at least one full-time equivalent staff member for each four beds.